T.H.E. Co. d/b/a L. D. Brinkman Southeast *and* Teamsters, Chauffeurs, Warehousemen and Helpers Local Union #385. Case 12-CA-9505(1-2)

April 19, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On October 7, 1981, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Administrative Law Judge only to the extent consistent herewith.

Respondent excepts to the Administrative Law Judge's finding that it violated Section 8(a)(1) of the Act by engaging in surveillance of its employees' union activities on December 6, 1980. We find merit in Respondent's exceptions for the following reasons.

A group of Respondent's employees attended a union meeting on December 6 at the Teamsters meeting hall on Kirkland Road. The meeting ended around dusk in a parking lot which had but one light. At the conclusion of the meeting, employees milled around outside the meeting hall. Shortly thereafter, employees James Reynolds, Charles Cranford, and John Thompson saw a dark brown Mercury car drive back and forth at a speed of somewhat less than 45 miles per hour a total of four times in a 20-minute period. After the car passed by the first time, Reynolds moved from where everyone else was standing, 250 feet from the roadway, tc a spot approximately 55 feet from the road. While Reynolds was convinced that the car was that of Vice President Tracy Williams, he could not identify the driver. Thompson, who was even unsure whether the car was Williams', also could not identify the car's driver. Cranford, however, still 250 feet away, testified that he saw two people in the car and identified Tracy Williams as the driver.

The Administrative Law Judge credited Cranford's testimony, notwithstanding the Administrative Law Judge's admission that Reynolds, who was much closer to the road, could not identify Williams as the driver; that Thompson would not testify that Williams was driving the car; and that Cranford had a particular interest in picking out Williams because Cranford was terminated by Respondent allegedly for his union activity. The Administrative Law Judge noted that Cranford's identification of Williams was not "so far beyond the scope of possibility as to suggest that such testimo-

[1] Respondent has excepted to the Administrative Law Judge's failure to strike discriminatee Cecil Clinton Pace, Jr.'s testimony. We find no merit in Respondent's exceptions for the reasons given by the Administrative Law Judge.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. In adopting his finding that Malch's calling Pace "Jimmy Hoffa" constitutes an unlawful impression of surveillance on the facts of this case, we disavow the adverse inference drawn by the Administrative Law Judge from Respondent's failure to ask witness James Bounds about this conversation, since the witness was equally available to the General Counsel. See *Hitchiner Manufacturing Company*, 243 NLRB 927 (1979). Nonetheless, we find that the other grounds relied on by the Administrative Law Judge are sufficient for crediting Pace's testimony.

We also correct the following inadvertent errors in the Administrative Law Judge's Decision: (1) At sec. III, 2(a), par. 6, it was Cranford, not Williams, who was not being observed by Respondent because of any "trouble;" (2) at sec. III, 2(c), par. 5, Pace, not Malch, was recognized as a union activist; (3) at sec. III, 2(c), par. 12, Cranford, not Williams, waited at the truck rental agency for Williams to arrive; (4) at sec. III, par. 78, Malch called Pace "Jimmy Hoffa" on December 9, not December 8; and (5) throughout his Decision the Administrative Law Judge misspelled Robert Malch's name as Robert Mulch.

[3] In adopting the Administrative Law Judge's finding of an 8(a)(3) violation in Pace's discharge, we do not rely on his conclusion that there is no evidence to indicate that Pace was a slow worker. We agree with the Administrative Law Judge's conclusion, however, since Supervisor Williams subsequently disavowed this reason as a basis for Pace's discharge. As for his finding of an 8(a)(3) violation in Cranford's discharge, we disavow reliance on the Administrative Law Judge's conclusion that this case does not fall under the analysis set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). We adopt the Administrative Law Judge's 8(a)(3) finding, however, because the facts set forth by the Administrative Law Judge prove a *prima facie* case which has not been rebutted pursuant to *Wright Line, supra*. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

Moreover, in those sections of his Decision entitled "Remedy" and "Order," the Administrative Law Judge recommends that Respondent offer Cranford immediate and full reinstatement to his former position. Respondent excepts to this portion of the Administrative Law Judge's Decision on the ground that Cranford was allegedly drunk when he had the accident while driving Respondent's truck, and that, even if his discharge were unlawful, Respondent should not have to reinstate him. We find that this issue is best left to the compliance stage of this proceeding (see *W. Kelly Gregory, Inc.*, 207 NLRB 654 (1973)) since the record provides insufficient evidence that such was Respondent's general practice in like cases.

Finally, in adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act by Williams' threatening to discharge employees during his conversation with Reynolds, we reject Respondent's assertion that *W. W. Grainger, Inc.*, 255 NLRB 1106 (1981), is controlling here. Contrary to Respondent, the Board majority's conclusions in *W. W. Grainger, Inc., supra*, did not turn on whether the interrogation there was addressed to an "employee." In *Grainger*, the issue presented was whether the safeguards of *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964), should apply to a discharged employee seeking reinstatement through a Board proceeding. Here we have no evidence of any attempt by Respondent to satisfy any one of the *Johnnie's Poultry* requirements.

ny, though uncontroverted, carries its own death wound of incredibility." In so finding, the Administrative Law Judge relied heavily on Williams' failure to deny that he engaged in such surveillance when he testified.

We disagree with the Administrative Law Judge's crediting of Cranford's testimony concerning this incident.[4] Given the time of day, his distance from the road, the poor lighting conditions, and the fact that employees Thompson and Reynolds were unable to identify anyone in the car, we find that Cranford's testimony is insufficient to supply a *prima facie* case that Williams was driving the car. Reynolds' failure to pick out the car's driver is even more significant since he was much closer to the road for a portion of this incident. We also note that none of the three witnesses could identify any distinguishing characteristics of the car. Finally, since there is no *prima facie* case, we find no significance in the lack of testimony by Williams on this point. Accordingly, contrary to the Administrative Law Judge, we dismiss this complaint allegation.

AMENDED CONCLUSIONS OF LAW

Substitute the following Conclusion of Law 3 for that of the Administrative Law Judge:

"3. Respondent violated Section 8(a)(1) of the Act on December 6, 1980, by coercively interrogating its employees; on December 9 and 15, 1980, by giving the impression that their union activities were under its surveillance; and on December 15 and 23, 1980, by unlawfully threatening to discharge employees for union activities, and violated Section 8(a)(1) and (3) of the Act on December 17, 1980, by discriminatorily and unlawfully discharging employees Pace and Cranford because of their activities on behalf of and membership in Teamsters, Chauffeurs, Warehousemen and Helpers Local Union #385."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, T.H.E. Co. d/b/a L. D. Brinkman Southeast, Orlando, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating and threatening employees with discharge in retaliation for their support of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union #385 or any other labor organization.

(b) Creating among employees the impression that their union activities are under surveillance.

(c) Discouraging membership in or support of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union #385, or in any other labor organization, by discharging any of its employees or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or condition of employment.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer employees Charles Kenneth Cranford and Cecil Clinton Pace, Jr., immediate and full reinstatement to their former positions of employment or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings or other benefits in the manner set forth in Administrative Law Judge's Decision entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, all payroll and other records required to calculate the amount of backpay and the terms and conditions of reinstatement as set forth in that part of the Administrative Law Judge's Decision entitled "Remedy."

(c) Post at its offices and facilities in Orlando, Florida, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this

[4] Despite discrediting Cranford's testimony on this point, we find no basis therein for disturbing the Administrative Law Judge's crediting of his testimony as to other matters, for as Judge Learned Hand stated, "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *N.L.R.B.* v. *Universal Camera Corporation*, 179 F.2d 749, 754 (2d Cir. 1950).

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT coercively interrogate or threaten to discharge our employees in retaliation for their support of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union #385, or any other labor organization.

WE WILL NOT create among our employees the impression that their union activities are under surveillance.

WE WILL NOT discourage membership in Teamsters, Chauffeurs, Warehousemen and Helpers Local Union #385, or any other labor organization, by unlawfully discharging any of our employees or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL offer employees Charles Kenneth Cranford and Cecil Clinton Pace, Jr., immediate and full reinstatement to their former positions of employment or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole for any loss of net earnings or other benefits, with interest.

T.H.E. CO. D/B/A L. D. BRINKMAN SOUTHEAST

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: Upon charges and amended charges filed and served by Teamsters, Chauffeurs, Warehousemen and Helpers Local Union #385, herein called the Charging Party or the Union, on December 29, 1980, and February 6, 1981, the Regional Director for Region 12 for the National Labor Relations Board, issued a complaint and notice of hearing on February 10, 1981, against T.H.E. Co. d/b/a L. D. Brinkman Southeast, herein called Respondent. The complaint, as amended at the hearing, alleges, *inter alia*, the unlawful discharge of two of Respondent's employees, Pace and Cranford, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, herein called the Act; and various independent violations of Section 8(a)(1). Respondent filed a timely answer and also made denials at the hearing of General Counsel's amended complaint. In its answer, Respondent, *inter alia*, admitted the jurisdiction of the Board, but denied the commission of any unfair labor practices.

At the hearing, General Counsel and Respondent were represented by counsel who had the opportunity to call and examine witnesses, to present testimony and other evidence, to argue on the record and, after the close of the hearing, to file briefs. At the conclusion of receipt of the evidence, all parties waived oral argument and General Counsel and Respondent filed post-hearing briefs.

Upon the entire record in this case, including my obseruation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find that at all material times Respondent, a Florida corporation, maintaining an office and place of business located at 7475 Chancellor Drive, Orlando, Florida, and having other facilities in the States of Florida, Georgia, North Carolina, and South Carolina, has been and is engaged in the nonretail sale and distribution of carpet and related products. During the 12-month period preceding issuance of the complaint, Respondent, in the course and conduct of its business, purchased and received at its facility in Orlando, Florida, products, goods, and materials valued in excess of $50,000 which were shipped directly from points located outside the State of Florida. I conclude that Respondent, at all material times has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaint alleges that the Union is a statutory labor organization within the meaning of Section 2(5) of the Act. Respondent pleads that it is without knowledge of such allegations but thereafter failed to controvert evidence adduced by General Counsel through the testimony of Gary Thornton, secretary-treasurer and business agent of Local Union #385. Thornton testified that the Union is engaged in the function of negotiating contracts with employers relating to grievance procedures, wages, hours, and working conditions on behalf of employees who are its members. The members elect the Union's officers and attend monthly meetings. He testified that the Union had some 70 contracts with employers covering employees and that on Friday, December 12, 1980, the Union mailed a demand for recognition as collective-bar-

gaining agent in a unit of Respondent's employees (G.C. Exh. 2), which Respondent admits receiving in due course on December 15, 1980, (Monday), and also filed with the Board a petition for certification in said unit on December 16, 1980 in Case 12-RC-6012 (G.C. Exh. 3). In view of the failure of Respondent to adduce testimony to the contrary, I conclude that the Union, at all material times, has been, as alleged, a labor organization within the meaning of Section 2(5) of the Act. *N.L.R.B.* v. *Cabot Carbon Company, and Cabot Shops, Inc.*, 360 U.S. 203 (1959).

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent in the last quarter of 1980 employed about nine truckdrivers and 40 to 50 warehouse and clerical employees in its Orlando facility.

Uncontradicted and credited testimony of General Counsel's witnesses, as more fully described below, discloses that on or about October 4, 1980, four or five of Respondent's nine truckdrivers met with Vice President Tracy Williams and requested increased wages. Williams refused any increase and on or about October 7, 1980, one of the drivers, James Reynolds, went to the Union, received blank membership application cards, and he and another driver, John Thompson, thereafter commenced distributing them. Interest in the Union was not substantial through mid-November. By mid-November, with 16 drivers and warehouse cards signed, driver Charles Cranford undertook to obtain more signatures. In mid-November, a union meeting of the drivers and other employees was scheduled for December 6 at the Teamsters meeting hall.

The complaint alleges six independent violations of Section 8(a)(1), five of them derived from conduct of Tracey Williams, vice president of Respondent's distribution systems.

1. The two alleged 8(a)(1) violations of December 6, 1980: surveillance and interrogation

(a) The complaint alleges that Tracey Williams engaged in unlawful surveillance of union activities on December 6, 1980, in the vicinity of North Kirkland Road, Orlando, Florida.

The evidence in support of this allegation consists of the testimony of three employees (or exemployees) of Respondent: James Reynolds, resigned from employment on December 23, 1980; Charles Cranford discharged on or about December 17 (Respondent maintains Charles Cranford discharged on or about December 18), one of the two alleged discriminatees in this complaint; and John Thompson, an employee employed by Respondent at the time of the hearing. It is not disputed that some 17 of Respondent's employees attended a union meeting on Saturday, December 6, at the Teamsters' Orlando meeting hall on Kirkland Road. The meeting started between 3 and 4 p.m. and ended sometime at or before 6 p.m., just when it was getting dark.

These three witnesses, called by General Counsel, testified that they saw a dark brown or dark hued Mercury drive back and forth at a speed somewhat less than the 45-mile-per-hour speed permitted on Kirkland Road, a total of three to four times. Respondent did not dispute that Tracey Williams drives such a car. The testimony was essentially that, in a 5-minute period, it made two round trips, a total of four passages, although Cranford did not see it on its first passage but heard an exclamation from James Reynolds (who was watching the road whereas Cranford then had his back to it). Thompson was standing nearby with several other employees in the parking lot where there was only one light. Kirkland Road was not separately lit. Neither Thompson nor Reynolds could identify the driver or any alleged passenger in the car. Cranford testified that he saw two people in the car, the driver being Tracey Williams. Thompson was not at all sure that the brown Mercury he saw was Tracey Williams' car. Reynolds was quite sure that it was, although none of the three witnesses observed any distinguishing, identifiable characteristic on the car that they saw on Kirkland Road compared to the Mercury which Tracey Williams regularly drove. Thompson testified that with the passage of the car on the first occasion, Reynolds rushed from their common position, some 250 feet from the roadway, to the roadway and some 55 feet from where the car was then passing. Nevertheless, as noted, Reynolds testified that he did not see who the driver was. After approaching the roadway, Reynolds retreated to the place commonly occupied by Reynolds, Cranford, Thompson, and other employees who had just left the December 6 meeting.

Although Vice President Tracey Williams was examined by the General Counsel under Section 611(c) of the Federal Rules of Evidence as an adverse witness and cross-examined by Respondent; and although Williams was thereafter called as a witness for Respondent, Tracey Williams failed to deny the above testimony. While I ordinarily might agree with Respondent that it appears extremely odd for Reynolds, about 55 feet from the roadway, to be unable to recognize the driver, and Cranford, about 250 feet from the roadway, being able to recognize the driver and the existence of a passenger in the accompanying passenger seat; and while the disposition of this allegation might have taken on a completely different character had Vice President Tracey Williams actually denied the testimony in support of the allegation, yet, in light of his failure to do so, notwithstanding the existence of at least one clear opportunity to do so, I am unable to conclude that Cranford's identification of Williams as the driver, which perfects a *prima facie* case of surveillance, is so far beyond the scope of possibility as to suggest that such testimony, though uncontroverted, carries it own death wound of incredibility. I am unable to do this notwithstanding that Reynolds, 55 feet from the roadway, was unable to identify the driver. I do not know, on this record, what the position of the allegedly surveilling automobile was by the time Reynolds reached his proximate position, or the angle the car presented to him or whether the driver's face was in some way obscured. Further, I recognize the relatively poor prevailing lighting conditions, Cranford's interest in the case as a discriminatee, and Thompson's inability to identify the driver. I am nevertheless unable, on this record, to conclude that Cranford's testimony is so incredible as

to be dismissed out of hand. Thus, particularly in light of Tracey Williams' multiple failure to deny his presence,[1] I conclude not only that Cranford should be credited but that Tracey Williams did make four passages within the space of 5 minutes on December 6, 1980, at or about 6 p.m., in front of the union hall and that such maneuvering by Tracey Williams constituted, and was for the purpose of conducting, *surveillance* of the employees union activities at the Teamsters meeting hall. Williams four passes, unexplained, leads to an inference of unlawful surveillance. No direct evidence of Williams' knowledge or intent to surveillance is required. I further conclude that such surveillance, without denial, justification, or other explanation, constitutes a violation of Section 8(a)(1) of the Act, as alleged.

(b) The above act of unlawful surveillance, as noted, occurred sometime at or about 6 p.m. on Saturday, December 6, 1980.

About 5 hours before this act of unlawful surveillance, i.e., at or about 1 p.m., Vice President Williams telephoned long-haul driver John Thompson at home (in December 1980, the long-haul drivers were supervised by Tracey Williams) who was not scheduled to work on that Saturday and told him that he wanted to see Thompson in his office as soon as possible. Thompson went to the office and, after a conversation in which Williams told Thompson of the discharge of other employees that week, including the discharge of Erstwhile Trucking Supervisor Handley on the day before, Williams, according to Thompson, asked him if there was "any talk of the Union" by Respondent's drivers and warehousemen. Thompson said he answered "yes," and Williams thereupon read to him from a statement prepared by Respondent's attorneys in which Williams described, *inter alia*, that in the event of strikes because of the Union, Thompson, with other employees, would receive no pay and that Thompson, in the event of his joining a strike, could legally be replaced. On cross-examination, Thompson testified, and I find, that Williams had made no request for him to identify other employees engaged in union activity, did not ask him if he was involved, and merely read from the statement. He also admitted that the statement included an assertion that while the Company opposed the Union and hoped that Thompson would not sign a card, that Thompson was free to do so if he wished.

It may well be true that not all interrogation constitutes coercive interrogation within the meaning of Section 8(a)(1) of the Act,[2] and under other circumstances, a casual inquiry concerning the knowledge of an employee of union activity among his coemployees perhaps may not constitute unlawful coercive interrogation within the meaning of Section 8(a)(1) of the Act. In the instant case, during an organizational drive, Thompson, not scheduled to work on a Saturday, December 6, was summoned by telephone by his supervisor to the supervisor's private office (one of Respondent's chief supervisors according to its president and chief operating officer, James Traweek) told privately of the discharge of other employees and then asked if there was any talk of the Union among his coemployee drivers and warehousemen. Thereafter, Williams immediately read not only of Respondent's antipathy to the Union, its opposition and its right, in the event of a strike (which was nowhere threatened on this record) to replace any employee (including the employee who was standing before him) and not to pay him if he should join in a strike.

From Respondent's question and written message above, it is clear that Respondent more than suspected the existence of union activities among its employees. Its having already received legal advice on the issue is not coincidence. Under these circumstances, it would seem that Respondent, by posing the simple question of whether Thompson knew of union activities among his coemployees, places Thompson on the horns of a dangerous dilemma. On this record, neither Thompson, nor any other similarly situated employee could know the extent to which Respondent was appraised of the extent of union activity among its employees and by the interrogated employee, in particular. If he should truthfully answer "yes," he might be opening an area he would prefer to keep closed. If he should falsely answer "no," and if the interrogator might suspect otherwise, the employee might, at the very least, damage his credibility and standing as an employee. If Respondent, indeed, knew that a "no" answer was untrue, the employee could reasonably fear that Respondent would infer that Thompson was sympathic to the Union, even if that were not so. Especially during an organizational effort, it is just such a dilemma which the Act seeks to eliminate; and just such union activities and knowledge which Thompson, and his coemployees, under the Board and Court interpretation of the Act, has a right to keep from

[1] Respondent argues (Br. p. 21) that no adverse inference should be drawn from Williams' failure to deny. Even without an adverse inference, Cranford's testimony stands unrefuted. In light of Williams' presence in the witness box and his obvious failure to deny, an adverse inference, in addition, should be—and is—drawn. For where the party-witness is *not* produced to deny or explain General Counsel's testimony of a *prima facie* violation, an adverse inference may be drawn. *N.L.R.B.* v. *Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889. Where, as here, the allegedly offending party-witness *is* produced and fails to deny the *prima facie* testimony, any force in favor of drawing an adverse inference applies *a fortiori* and, moreover, decidedly affects the prior issue of persuading the trier of fact that testimony which may appear suspect, at first blush, cannot peremptorily be brushed aside as unbelievable.

[2] The Board rule, which, of course, I follow, is that for purposes of Sec. 8(a)(1), it is not the employer's intent or the affect of the conduct, but whether the "conduct may reasonably be said to have a tendency to interfere with the exercise of employee rights under the Act." *El Rancho Market*, 235 NLRB 468, 471 (1978); compare *Quemetco, Inc., a subsidiary of R. S. Corporation*, 223 NLRB 470 (1976). In assessing whether interrogation is proscribed by Sec. 8(a)(1), certain courts broaden the scope of analytical inquiry to include the entire pattern of employer conduct. *N.L.R.B.* v. *Laredo Coca-Cola Bottling Co., supra*. As noted in the text, measured by either standard, Williams' question was "coercive" and thus unlawful. The Board rule, Respondent's interpretation of a court of appeals decision notwithstanding (Resp. br., pp. 24–26), is that lawfulness does not turn on the subjective reaction of the interrogated employee. *El Rancho Market, supra* at 471, fn. 11. I would not quickly credit Thompson's testimony that Williams' statements did not frighten him, in any event, since he was testifying as a currently employed driver in Williams' presence in the courtroom.

his employer. See *N.L.R.B.* v. *Laredo Coca-Cola Bottling, supra.*[3]

I conclude that Williams' inquiry of Thompson on December 6 concerning his knowledge of union activities among coemployees constituted coercive interrogation and, as alleged, violated Section 8(a)(1) of the Act.[4]

2. Threats of unlawful surveillance and discharge

(a) The complaint further alleges that on December 15, 1980, Vice President Williams both created an unlawful impression of surveillance of employees' union activities and threatened an employee with discharge. *Prima facie* proof of these two allegations rests solely on the testimony of Cranford, an alleged discriminatee herein. Cranford's testimony, in addition, provides the sole source by which Respondent is allegedly to possess knowledge of Cranford's union activities, which knowledge creates the predicate for the inference, alleged by the General Counsel, that Respondent's ultimate motivation in its December 17 discharge of Cranford, was unlawful. Thus, Cranford's testimony regarding this December 15, 1980, incident, is alleged both as independent violations of Section 8(a)(1) in two respects (unlawful impression of surveillance and a threat of discharge) and is also the basis of Respondent's knowledge of Cranford's union activities.

Cranford testified at some length regarding his alleged union activities including his testimony that he signed a union card on November 14, 1980. His testimony with regard to his activities in or about November 1980 was consistently confused with statements in the pretrial affidavit be submitted to the Board; that these activities occurred in October 1980. Nevertheless, I credit his explanation that he was confused by the dates of the events when he gave the statement;[5] that his memory was jogged by the fact that his union activities occurred shortly before Thanksgiving (in November) and that he became more active on or about November 18, 1980, when he picked up 16 signed union cards from coemployee Bob Glasgow, went to the union hall, and then, after delivering to the Union the signed union cards, received more union cards for distribution which he gave to Thompson. There is no suggestion in Cranford's testimony that any of his union activity occurred on Respondent's property much less in the presence of any of Respondent's supervisors. At most, he testified, with regard to Respondent's knowledge of his union activity, that some 17 of Respondent's employees attended the December 6 union meeting at the Teamsters hall and that one of those employees must have told Respondent of his presence there and of his being the initiator of the distribution of further unsigned union cards on and after November 18.

With this as background, Cranford testified that, on December 15, 1980, a Monday, he was at Respondent's loading platform at or about 7 p.m.; that Vice President Williams, then his supervisor, called him over and said: "You're causing trouble; it has to stop." Cranford asked Williams to be more specific and tell him what he meant by that statement. Cranford said that Williams answered: "You're causing 'waves' and your ship is going to sink."

Williams denied any such conversation with regard to "causing trouble" or "waves" or that Cranford's ship is going to "sink." Williams not only denied having said that on December 15 but denied having said it anytime and notes that it was not his style of language. Williams testified that his only conversation with Cranford concerned his job as Cranford's supervisor; and that he telephoned Cranford on the day of his discharge, Thursday, after 6 p.m. and told him that his services were no longer required because he had had a second "chargeable incident." In particular, Williams denies any statement in which he asserted that Cranford was "making trouble."

In view of the fact that the disposition of this credibility conflict relates to the resolution of the alleged violation of Section 8(a)(3) with regard to Cranford's discharge, I shall resolve this issue below in the discussion regarding Cranford's discharge.

In his motion to dismiss, however, at the conclusion of the General Counsel's case-in-chief, and in (Resp. br. p. 30, *et seq.*), Respondent argues that even if Cranford were *arguendo* credited, Williams' statement would be speculative and would not constitute a violation of Section 8(a)(1) either as an impression of unlawful surveillance or a threat of discharge because of its ambiguity, especially in the failure to mention the Union, citing an administrative law judge's analysis in *Reliance Electric Company, Madison Plant Mechanical Drives Division*, 191 NLRB 44 (1971). The Board, itself, in analyzing the issue concluded the absence of specific reference to the Union "means little," *El Rancho Market, supra* at 471, fn. 11, and that a merely circumspect violator shall not be rewarded for his indirection. At or about this time, there is no suggestion in the record that Williams was then in any way the object of Respondent's observation with regard to any "trouble." As far as this record goes, Cranford was a truckdriver who was then not subject to

[3] Neither *Blue Flash Express, Inc.*, 109 NLRB 591 (1954), nor *Paceco* v. *N.L.R.B*, 601 F.2d 180, 183 (5th Cir. 1979), for instance, are to the contrary. Several of the *Paceco* protective indicia were not observed by Respondent. Here, the hierarchical place of Williams is clear; union hostility is present; the boss' office was the locus of the question; Thompson was summoned on a nonwork day; there was no valid purpose of inquiring of union activity. Moreover, as noted in *Laredo Coca-Cola Bottling Co., supra* at 342, fn. 8, the *Paceco* test is not definitive and a violation may occur even if all the *Paceco* factors favor the employer. The assurance against reprisal, it seems, is far outweighed by other circumstances in deciding the "coercive" effect. These other circumstances showing the inhibiting effect of such interrogation flow from the fact that Thompson was summoned to the chief supervisor's office on a nonwork day. Could be reasonably believe he was being singled out?

[4] It must be noted that Williams ultimately denied asking the question although his testimony, as shown by the record, vacillated as to whether he actually asked Thompson a question concerning union talk among his coemployees or whether he merely read from the statement. I do not credit Williams' testimony insofar as he denied asking Thompson the question.

[5] Dates, and even sequence, are notoriously the subject of testimonial confusion, *Local Union 195, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canda, AFL–CIO (Stone & Webster Engineering Corporation)*, 240 NLRB 504, 514, fn. 9 (1979); enfd. *per curiam N.L.R.B.* v. *Local Union No. 195, United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canda, AFL–CIO*, 606 F.2d 320 (5th Cir. 1979), summary calendar, without substantially affecting credibility determinations relating to disputed conversations.

any adverse criticism with regard to his work or conduct. Under these circumstances, with the Union's demand for recognition received by Respondent on the morning of December 15, with Cranford, in mid-November, distributing union cards through Thompson, and with Respondent having inquired of Thompson on December 6 concerning such activities, I have no hesitation inferring that Williams' statement to an employee (who had attended a union meeting and was a card distributor, regardless of the source from which Respondent may have gained knowledge or suspicion thereof), that the employee was "causing trouble" which had to "stop" and that the employee was making "waves" and that his ship was going to "sink" is not so ambiguous as to mystify anyone, including the employee, that Respondent was referring to the employee's union activities. Such a statement, I infer, can and does reasonably mean that such union activities were going to cause Cranford to be discharged (his "ship" was going to "sink"). We have come too far to believe that employees engaged in union activities are so dull as to not recognize the implication of such a figure of speech from an employer who has early manifested opposition to their union activity (Williams' December 6 statement read to Thompson) and who occasionally falls over into unlawfulness with regard to such opposition. As Justice Holmes remarked long ago, "Even a dog knows the difference between being tripped over and kicked." I conclude therefore that, contrary to Respondent's assertion that Williams' statement may not have related to union activities (Resp. br. p. 30) if such statement were made to an employee, it would constitute both an impression of unlawful surveillance of Cranford's union activities and a threat of discharge, both in violation of Section 8(a)(1) of the Act.

(b) The complaint also alleges that on or about December 26, 1980, Respondent, through Tracey Williams, threatened that employees would be discharged if they continued their organizing activity on behalf of the Union. The allegation (complaint, par. 6(e)) alleges that such a statement was made to and threatened an employee.

The only testimony in support of that allegation is that of James Reynolds but that testimony is uncontradicted and credited. Reynolds testified that on December 23, 1980, he was in Tracey Williams' office at or about 8:30 p.m. On direct examination he testified, and I find, that he went there to ask for more wages because he could not support himself on his salary and that, when Williams refused to grant him a salary increase, Reynolds asked him if he was going to fire anybody. Reynolds said that Williams answered that he would not fire "the fence sitters" but would fire only those "heading up the union organization." Reynolds says Williams added: "You are defeated, you should give it up." Reynolds then added that the phrase "give it up" was added to words concerning union activity.

On cross-examination, Reynolds testified, and I find, that he had already told Williams that he was resigning *prior* to the time he asked Williams whether he was going to fire anybody and prior to the time that Williams disclosed his position regarding firing only those who "headed up" the union organization.

Counsel for Respondent urges (Resp. br. p. 33, *et seq.*) that this statement does not violate Section 8(a)(1) of the Act because Reynolds, having already resigned, was no longer an "employee" within the meaning of the Act and therefore any otherwise unlawfully coercive statement[6] or threat made to him would not be made to an "employee" and therefore would not be in violation of the Act.

Assuming, *arguendo*, that Reynolds had already "resigned," the Board has decided this question of the definition of an "employee," contrary to Respondent's argument, in *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977), *Oak Apparel, Inc.*, 218 NLRB 701 (1975), and cases at least as early as *Briggs Manufacturing Company*, 75 NLRB 569, 570–571 (1947); cf. *Chesterfield Chrome Co.*, 203 NLRB 36 (1973); and *Doughboy Recreational, Inc.*, 229 NLRB 381, 388 (1977). In *Little Rock Crate and Basket Co., supra*, an employer threatened to cause the arrest of a recently lawfully, discharged employee (Green) who was distributing union literature on company property while waiting for his final pay to arrive. The Board, holding the threat of arrest addressed to this person violated Section 8(a)(1) of the Act, did not relate the violation to the fact that the threat was made in the presence of other employees, but stated:

> As found by the Administrative Law Judge, there is no merit in Respondent's contention that Linton's conduct was lawful because Green had been discharged earlier that morning. First, notwithstanding his discharge, Green remained a statutory "employee" within the meaning of Section 2(3) of the Act, as the Board has long held that that term means "members of the working class generally," including "former employees of a particular employer."

In view of the Board's position on the scope of "employee" in Section 2(3) of the Act I conclude, in the face of Tracey Williams' failure to deny this conversation with Reynolds, that it indeed occurred, was made to an "employee," and that it constituted an unlawful threat of discharging other employees thereby violating Section 8(a)(1) of the Act as alleged. Moreover, it demonstrates Williams union animus and his willingness to discharge employees for their union activities notwithstanding his attorney's efforts to educate him against such illegal conduct.

(c) The last allegation of a violation of Section 8(a)(1) of the Act is that on or about December 9, 1980, Respondent, acting through its supervisors, Robert Mulch,[7]

[6] Whether or not Respondent's legal argument is sound, and I believe it to be without merit, its failure to deny such testimony bears heavily and directly on Williams' state of mind; his union animus and willingness to discharge employees for their union activities, albeit primarily those who are not merely "fence-sitters."

[7] At the hearing and in its answer, Respondent admitted that, as alleged, Tracey Williams and Robert Mulch were supervisors within the meaning of Sec. 2(11) of the Act. Nevertheless, Respondent denied the "agency" of these two supervisors on the ground that it was a "legal conclusion." I conclude on the basis of all the evidence that both Mulch (supervisor in the warehouse) and Tracey Williams, a vice president and one of Respondent's chief supervisors, were agents of Respondent within the meaning of Sec. 2(13) of the Act.

created the impression of surveillance by calling an employee "Jimmy Hoffa."

The sole evidence and support of this allegation was the testimony of Clinton Pace, Jr., one of the two alleged discriminatees in this complaint. Pace testified that he signed a union card; passed the word among coemployees of the approaching December 6 union meeting; attended the union meeting on December 6, 1980; and talked with the other 40 to 50 employees in the warehouse concerning the Union.

Pace testified that on December 9, 1980, while working as a "vinyl puller" (using a forklift hi-low truck to extract rolls of vinyl floorcovering from bins in Respondent's warehouse), he had a conversation with Supervisor Robert Mulch at or about 9:45 a.m. in front of the vinyl cutting table. Mulch said to him: "Good morning Jimmy Hoffa." Pace asked Mulch: "What do you mean; Jimmy Hoffa is missing." Mulch answered: "Yes." About an hour later, 10:45 a.m., Pace, in front of the production desk in the warehouse, asked Mulch what he meant by calling him "Jimmy Hoffa." To this, Mulch answered: "Nothing."

Pace testified that in this earlier conversation, where Mulch called him Jimmy Hoffa, an employee, James Bounds, still employed by Respondent, was about 12 to 15 feet away and might have heard the conversation. Although Respondent called James Bounds as its witness and examined him on other facts, it specifically stated that it would not examine him, and it did not examine him, with regard to his presence near the conversation nor whether he heard the Pace-Mulch conversation.

Respondent attacks the allegation both legally and factually: "As a matter of law," Respondent argues that the assertion fails to constitute an allegation of the impression of surveillance even if Pace is credited. I concluded to the contrary, that a supervisor, during a union organizing campaign by the Teamsters calling an employee "Jimmy Hoffa," under the instant circumstances, is not mere name-calling, since, on this record, Pace's union activities were not common knowledge; and that "Jimmy Hoffa" labels him as a prominent supporter or member of the Teamsters Union. Thus, regardless of the source of Mulch's information concerning Pace's sympathies and activities, and regardless of its occurring, but in view of Respondent's union animus, when, 3 days after Pace attended the December 6 union meeting, he told Pace on the morning of December 9, 1980, "Good morning Jimmy Hoffa," he was directly stating that he recognized Mulch as a Teamsters activist, the same as Jimmy Hoffa. Such a statement creates an impression of surveillance and is unlawful within the meaning of Section 8(a)(1) of the Act.

With regard to the factual issue, Respondent, through counsel, stated that it was unable to produce Mulch to testify concerning Pace's testimony because Mulch was in Saudi Arabia, having left Respondent's employ some years prior to the issuance of the complaint. However, in resolving the factual question whether Mulch called Pace "Jimmy Hoffa," I do not draw any inference adverse to Respondent from its failure to call Mulch, apparently unavailable. I do however legally fault Respondent, in its deliberate failure to inquire of its witness, James Bounds, (a) whether he was, indeed, 12 to 15 feet away from any such conversation; and (b) whether he heard the conversation. Respondent specifically refrained from asking these questions, left the issue undisputed, and I draw an inference adverse from its failure to gain a denial from an employee under its control, indeed, on the witness stand, and thus negative Pace's testimony. I conclude that Respondent's failure to put these questions to Bounds[8] resulted from its conclusion that Bounds' testimony would have been adverse to Respondent by either undermining its defense or supporting Pace's version. Therefore, crediting Pace, I conclude that the statement was made; and that the statement, as made, constitutes an unlawful impression of surveillance, in violation of Section 8(a)(1) of the Act.

The discharge of Charles K. Cranford

Although Cranford's testimony, as above noted, demonstrated initial confusion, with respect to the dates of various occurrences, a common phenomenon among witnesses, much of Cranford's testimony was undisputed. Thus, I credit his testimony that around October 4, 1980, he, together with several other employees (Strong, Thompson, Fuller, and Reynolds), all truckdrivers (Respondent on or about this time employed nine truckdrivers) met with Tracey Williams with regard to gaining increased wages. When Williams refused, the employees decided to seek union help and on or about October 7, James Reynolds visited the union, procurred Union membership application cards, and he and Thompson distributed them. By on or about November 18, 1980, the organizational effort among the employees had slowed and, according to Cranford, he became more active in the organizational effort. He described himself as a "ringleader"[9] but, in any event, I find that it was Cranford who, on or about November 18, picked up 16 signed union cards from employee Glasgow and on that day delivered them to the union hall. As above noted, he himself had signed his union card on November 14. On November 18, Union Business Agent Thornton gave Cranford additional blank membership cards, which he thereafter gave to Thompson for distribution. Cranford and Thornton arranged for a meeting with employees on December 6 and Cranford, together with some 16 other employees, then attended the union meeting on December 6, 1980. The delay of the union meeting to December 6 was due to the intervening Thanksgiving holiday. It was this Saturday, December 6, 1980 union meeting at the Teamsters' Orlando meeting hall on Kirkland Road that Tracey Williams, after interrogating Thompson 5 hours earlier concerning union activity among Respondent's employees, kept under surveillance.

As above noted in the discussion under the alleged violations of Section 8(a)(1), Cranford testified that at or

[8] Respondent similarly failed to have Vice President Williams deny Reynolds' testimony regarding the December 23 "threat" or Cranford's identification of Williams as engaging in unlawful surveillance of the December 6 union meeting.

[9] Counsel for Respondent quite properly seized upon this bit of Cranford's self-inflating testimony. I have taken it into account but gave it no determinative adverse weight.

about 7 p.m. on December 15, 1980,[10] on Respondent's loading dock, Vice President Williams called him over and told him that he was "causing trouble"; that it "had to stop"; and that, when Cranford asked Williams to be more specific, Williams answered that Cranford was causing "waves" and also told them that his ". . . ship is going to sink." Also, as above noted, Williams specifically denied any such statements to Cranford made at any time.

On the next evening, December 16, 1980, when Cranford returned from his run at or about 8:30 p.m., and entered Respondent's parking lot, while backing his trailer truck into a narrow opening between two other trucks, he hit a dividing post with his right-front fender near the headlight. Cranford testified that he was extremely fatigued that evening; had made several attempts at parking in order to get the truck into the confined space; was unable to do so; and finally, without properly observing the post, hit the post with his right-front fender as he tried to maneuver the truck into the space. He further testified that he had had "two beers" on the road about an hour before this event and that two beers had made him even more tired. He denied being drunk. I do not readily accept his denial, but the matter, here, is immaterial except as an element of overall credibility. Nevertheless, he admitted that his coemployee, Charles Strong, backed the truck in for him. The record is clear, that Respondent had no knowledge of Cranford having drunk the alleged two beers or indeed of having consumed any, or been under the influence of, alcohol, at the time it thereafter discharged him.[11]

John Thompson credibly testified that he and Charles Strong, another Respondent truckdriver, were on the loading platform between 9 and 9:30 that night and saw Cranford return. They saw his tractor-trailer come into the yard and unsuccessfully try to enter the parking space. After he hit the dividing post at the right front of his tractor, he got out and told them that he could not back his truck in. Thompson, smelling alcohol on Cranford's breath, asked him if he was sick but Thompson could not remember what Cranford answered. In any event, Strong backed the tractor-trailer into the space and Cranford went to his car. As Cranford went to his car, he gave Strong some intracompany mail for delivery to the Orlando office and asked Strong to take it to the company office. When Strong told Cranford that he would back the truck in and when Thompson took the mail from Cranford Thompson told Cranford: "You can't go up on the dock like that." Cranford said he was going and then left for his car. Thompson took the mail and Strong then backed the truck in. It was not until a day or two *after* Cranford was fired (General Counsel alleges Cranford was terminated on December 17 and Respondent alleged that it was on December 18) that, on the loading dock, Thompson, after telling Williams that he had heard that Cranford was fired (Williams said that it was because he had had two accidents) that Thompson told Williams that, on the evening tha Cranford came in and "torn off his fender," Cranford had been drinking. Williams thanked Thompson for the information. I find that this was the first occasion on which Respondent had knowledge of Cranford's drinking. I noted that Thompson described the accident, which resulted in Cranford's hitting the right-front fender, as involving the fender being "torn off." This was a clear exaggeration when compared to the pictures of the damage to the right-front fender which are in evidence (G.C. Exhs. 4, 5, and 6) showing that the fiberglass fender had indeed been damaged but certainly not torn off. I noted at the hearing that Thompson testified not only with exaggeration but with relish concerning the damage to the fender. In this record, Cranford's testimony stands unrefuted that the damage estimate from Respondent's own truck rental agent (who also repaired the trucks) was $100. The repair bill was $140.

In any event, within a few hours after he hit the post, Cranford telephoned Williams and told him of the accident. Williams thanked him for the information and they agreed to inspect the damage the next day.

On the next day, December 17, Cranford telephoned Williams and told him that he would be at the truck rental agency to go over the damage with Williams in 30 minutes and they agreed to meet about 11 a.m. Williams went to the area, waited for an hour, but Williams never showed up. After an hour, Cranford left. Later that day, about 6:30 p.m., Cranford, at his home, was told that Williams had left a message that Cranford was not to leave on his next regular run before telephoning Williams. Cranford telephoned Williams and Williams told him that he had some bad news. According to Cranford, Williams told him: "Because of the trouble that you have caused and the damage you have done the night before, your services are no longer required." Williams testified that it was not on Wednesday, December 17 at 6 p.m, but rather on Thursday, December 18 at 6 p.m. that he telephoned Cranford and told him that his services were no longer required because he had had a "second chargeable accident." Williams specifically denied that he mentioned any "trouble" that Cranford caused was included in the discharge telephone call.

Respondent's defense to the Cranford discharge

Vice President Williams in particular, and Respondent's other witnesses, in general, denied knowledge of Cranford's union activities and Williams denied any conversations, both on December 15 (at loading dock) and in the discharge telephone call, which related to any "trouble" that Cranford had been making or his "ship sinking."

Williams testified that Cranford was discharged not on Wednesday, December 17, but rather on Thursday, December 18, on his recommendation and the decision of James Traweek, president, chief operating officer, and owner of Respondent. Cranford, however, testified without contradiction that the next day after the telephone conversation, he went in for his pay on Thursday, the normal payday. He also testified that he went in for the remaining balance of his pay on the following Thursday.

[10] It is undisputed, and I find, that earlier the same day Respondent received the Union's demand for recognition (G.C. Exh. 2).

[11] In view of Respondent's lack of knowledge on this point, I need not definitively resolve the question of any drunkenness as a cause for discharge.

The payroll period, according to Respondent, runs from Monday through Saturday with the payday on the succeeding Thursday for that period.

While the significance of the date of discharge is not dispositive, it is by no means irrelevant to Cranford's case.[12] I was not impressed by President Traweek's testimony that, although the fender damage occurred on December 16, he was not informed of the matter until December 18 when Tracey Williams told him. I am unable to believe that Tracey Williams did not tell the president of the Company of this December 16 accident at any time on December 17, but did so only on December 18. In view of the conclusion that Tracey Williams informed Traweek of the accident no later than the day after its occurrence, i.e., on December 17, the discharge on that same day; and further, in view of Cranford's testimony that he received the telephone call from Williams on the night before he went for his pay (which was on payday, Thursday, December 18), I conclude that Williams telephoned Cranford and notified him of his discharge on December 17, 1980, as Cranford testified.[13] In this regard, I note that Williams failed to testify with regard to any reason for the delay in notifying Traweek from the evening of December 16 until sometime on December 18.

Williams nevertheless testified that Cranford was terminated on December 18 on the decision of President James Traweek after Williams had reviewed the file and recommended to Traweek that Cranford be discharged solely because he had committed "two chargeable accidents." Williams defined a "chargeable accident" as one where the driver is "at fault."

There is also no dispute that, in a prior accident, on October 17, 1980, Cranford was "at fault" in damaging the overhead door at Respondent's Tampa, Florida facility causing damage of $255.32.[14]

Williams testified, however, that Cranford was discharged not because he had damaged the fender but because of Respondent's company rule that, where there were two chargeable accidents, the employee, an over-the-road truckdriver, was automatically discharged. Thus, Williams testified that it was this second accident, i.e., hitting the post at Orlando, that was the only reason for the discharge. He also testified that there were no separate "warning notices" placed in an employee file but rather that the accident report of a chargeable accident was itself a disciplinary notice.

Williams further testified that Respondent had an original rule whereby after the *first* chargeable accident, the employee was discharged; but that there came a time, not specified on this record, that the rule was allegedly changed to *two* chargeable accidents. Exactly when the rule was changed was not at all made clear by Williams or any other witness. Williams, however, said that the change of the discharge rule to two accidents was made in writing and that such writing was *distributed* to the employees in early 1980 with employee paychecks. Williams testified that the two-accident rule is still the company rule.[15]

Cranford testified that he never knew of a company rule regarding discharge for only one chargeable accident; and, further, that the first time he had ever heard of a company rule regarding two chargeable accidents as a basis for termination was when he attended a union meeting some 3 weeks *after* his December 17 discharge when he saw a letter, dated after the date of his discharge, signed by Tracey Williams, and addressed "to all drivers of L. D. Brinkman Southeast." The letter, according to Cranford's testimony, stated that there was a company rule requiring discharge on the basis of two chargeable accidents.

John Thompson, a witness who I viewed as not unsympathetic to Respondent, testified that, as far as he knew, there was no company policy relating to discharge based on chargeable accidents although he said it was "common knowledge" that a person who has accidents would not be kept in Respondent's employ. Specifically, however, he testified that he never saw a memorandum regarding any such company policy and he never had a conversation with any company supervisor regarding a policy on "chargeable accidents." Thompson was employed by the company from May 1979 to the time of the hearing as a long-haul driver.

President James Traweek testified with regard to the Cranford discharge that after he was notified by Williams of the damage to the truck and received Williams' recommendation for the discharge, he asked Williams for a statement regarding Respondent's "normal procedure" with regard to the discharge for accidents. Traweek had also testified that, as chief operating officer, he was fully familiar with Respondent's personnel policies. In any event, Traweek said that Williams told him, on or about December 17, 1980, that Respondent's normal procedure and policy was to discharge drivers who were guilty of a *single* chargeable accident. Traweek also testified that Williams told him that this was Cranford's second chargeable accident and that drivers are normally discharged after a chargeable accident. Having received this information, Traweek then conferred with his labor attorney concerning the feasibility and wisdom of dis-

[12] The Union's petition for certification in Case 12-RC-6012, which shows a filing date of December 16, 1980, was admitted by President Traweek (G.C. Exh. 3) to have been received by Respondent on the morning of either December 17 or 18. The issue, it seems to me, of the date of the discharge loses some of its effect as a dispositive question since if the petition was received on the morning of December 17 and since Cranford and Pace were discharged later on the same day, it might be argued that the discharges were spurred by Respondent's receipt of the Union's petition for certification. With regard to Cranford, however, the same argument could be made if the petition was received on the morning of December 18 and Cranford, as Respondent asserts, was discharged on the evening of December 18.

[13] Had the discharge occurred on December 18, Respondent could have produced its payroll or other records to demonstrate Cranford's allegedly erroneous testimony that it occurred on December 17. Respondent failed to do so.

[14] Respondent's original assertion of the damage was $400. As Respondent acknowledged, this was an overstatement since it paid $255.32 for the repair of the door. Such an error in no way affects the disposition herein.

[15] Although Cranford testified that truckdriver James Reynolds continued to work although he had two chargeable accidents (hitting a dividing pole and running a Georgia State trooper off the highway), Reynolds credibly testified that, at the time of his resignation, he had had only one chargeable accident.

charging Cranford and, according to Traweek, his attorney told him to follow his normal practice.[16]

After speaking with his attorney, Traweek then asked Williams whether there were any other drivers on the payroll with two chargeable accidents and Williams told him that there were none. Traweek, on the basis of this information, confirmed Williams' recommendation for the discharge.

Discussion and conclusions with the Cranford's discharge and the allegations of unlawful threat and unlawful impression of surveillance by Vice President Williams

As the Supreme Court noted in *N.L.R.B.* v. *American Ship Building Co.*, 380 U.S. 300, 312 (1965), it is often difficult to determine the motivation for the discharge of an alleged union proponent who may have broken a shop rule.

On the one hand, I have observed and weighed Cranford's testimony. My above findings and conclusions notwithstanding, there exists at least the possibility of exaggeration in his identification of Tracey Williams as the driver of the vehicle which, on December 6, 1980, engaged in unlawful surveillance at the Teamsters hall where Cranford was present with some 16 other employees; and the further possibility that his testimony regarding both his December 15 and December 17, 1980, conversations with Williams were occasions of self-help to prove Respondent's unlawful motivation in his discharge. Thus, I view with initial skepticism his testimony regarding Williams accusing him on December 15 of making trouble, making "waves" and that "his ship was going to sink." This from a vice president who was warned against committing unfair labor practices. Such testimony, of itself, if credited, brings at one stroke an inference of Williams' knowledge of Cranford's union activities, an unlawful impression of surveillance over such activities, and an unlawful threat to discharge. In addition, I am even more skeptical of Cranford's testimony regarding Williams' telephone call on the evening of December 17 wherein Williams allegedly said not only that Cranford was discharged because of a second chargeable accident, but because of the "trouble you have caused." A reasonable inference, if this testimony is credited, would be that the word "trouble" referred directly to Cranford's union activities and that such union activities were at least one of the reasons for the discharge. Thus, Cranford's testimony, in my view, as to the December 15 threat and impression of surveillance and the December 17 inference of unlawful motivation in the discharge is all rather convenient. In addition, Cranford has a monetary and job interest in the outcome of the proceeding as an alleged discriminatee. Thus, added to the convenience of his testimony is his monetary interest.

On the other hand, if his testimony regarding Williams' statements of either December 15 or 17 is credited, Cranford has presented a strong *prima facie* case of his being unlawfully discharged; and, if both are credited of having received a prior threat of discharge together with Respondent's having manifested an unlawful impression of surveillance, the case is even stronger.

The facts are not in dispute, however, that Respondent had notified its employees it was against the Union and that on the morning of December 15, before Williams allegedly unlawfully threatened Cranford, Respondent received the Union's request for recognition. Such a request might well have put Respondent's admitted union antipathy against its employees engaging in union activities in a different light. If, in addition, as James Traweek testified, he then might have received the union petition for certification from the Labor Board on the morning of December 17, such additional element can be considered and could throw additional weight on the side of crediting Cranford's testimony. Receipt of these alarming documents on December 15 and 17 would, in the ordinary course, have strengthened Respondent's fear of its employees' engaging in union activities and generated additional animus against such activities.

It is unnecessary, however, to speculate with regard to the force or effect of the receipt of these documents for I have resolved the question of Cranford's and Williams' credibility on four elements.

The first is the testimony of John Thompson and both my observation of Tracey Williams' denial of that testimony and the record thereof in the transcript. Thus, it was clear to me that Thompson, a witness not clearly unfavorable to Respondent's cause, testified that Tracey Williams summoned him to his office on a (Thompson) nonworkday and, after telling him of the discharge of employees and supervisors, asked him whether there was union activity among Thompson's coemployees. It was after this question that Williams read from a prepared statement regarding the Company's position with regard to strikers, wage payment, and replacement of strikers. This occurred, according to Thompson, on the early afternoon of December 6, 1980. I therefore observed Williams demeanor and testimony in trying to avoid a direct answer to the question, then settling on a denial and an assertion that he merely read from the statement prepared by Respondent's attorneys. I was dissatisfied with Williams' evasiveness and his demeanor and his lack of clarity as to whether he questioned Thompson. It was clear to me that Williams had indeed asked the question and was an untruthful witness in denying having asked the question and in his further testimony that he merely read from a prepared statement. Thus, with regard to Williams capacity and willingness to speak to employees about union activities, notwithstanding any prior or subsequent warning against such conversations from Respondent's lawyers and from President James Traweek, I find that Williams did indeed speak to employees with regard to their union activities. Secondly, he not only unlawfully interrogated Thompson but he also failed to deny unlawfully threatening Reynolds. While it is true that Reynolds may have already resigned, it is, I find, on

[16] Respondent's witnesses testified that they had long sessions with their labor attorney on or about December 11, and thereafter, regarding acts prohibited by the National Labor Relations Act and Respondent's tactics in meeting the Union's organizational effort. In this regard, it should be noted again that Respondent received the union demand for recognition on Monday, December 15, and the petition for certification from the Labor Board on December 17 or 18. Traweek stated that Respondent had the date-stamped envelope containing the petition. It was not produced.

this very basis, as counsel for Respondent suggested, that Williams might have felt free to speak to Reynolds with regard to Respondent's intent and desire in discharging union members. According to Reynolds' undenied and credited testimony, it was not the "fence-sitters" whom Williams would discharge, but those "heading up the union organization." Not only did Williams fail to deny this conversation but he also failed to deny that in this conversation (on December 23, 1980) he told Reynolds that "you are defeated, you should give it up." I have specifically credited Reynolds' testimony as altogether believable and that conclusion, of course, is reinforced by Williams' failure to deny the testimony. Thus, Respondent's animus and willingness to discharge union leaders was not constrained by the law, any prior legal counsel to the contrary notwithstanding.

Thirdly, of even greater importance in assessing the credibility of Cranford's testimony, Williams' denials and Respondent's motive, is the question of Respondent's defense: the existence of the "two chargeable accidents rule."

In the analysis of this matter, there is the testimony of four witnesses to be accounted for. The first is Cranford's rebuttal testimony that he knew of no rule regarding discharge for chargeable accidents until he saw a memorandum, signed by Williams, *dated* after the date of his own discharge. Secondly, supporting Cranford, there is Thompson's testimony denying knowledge of any such rule, whether a "one accident" rule or "two accident" rule. Thirdly, there is Tracey Williams' testimony that the two-accident rule had been introduced to replace the one-accident rule as the early part of 1980 and that its introduction was accompanied by the distribution of a memorandum, incorporating such change, to the drivers along with their payroll checks at that time. No evidence of such memorandum (of whatever date) was ever produced, either by Respondent directly or by Respondent seeking to obtain such memorandum or testimony thereof from any employee or even to get any employee to testify that he had received any such memorandum in the early part of 1980—or at any other time. As noted above, on the contrary, there is only Cranford's uncontradicted rebuttal testimony that he *did* see such a memorandum signed by Williams, but it bore a date *after* the date of his own discharge.

The fourth and last element for analysis is President Traweek's testimony with the regard to existence of a rule regarding accidents and discharge of truckdrivers. Traweek testified clearly that when he asked Williams on December 18, 1980, for Respondent's normal discharge procedure relating to chargeable accidents, Williams told him that the normal procedure was to discharge a driver after the *first chargeable accident*. Such a statement by Williams, based on Traweek's testimony, is completely contradictory to Williams' testimony that the two-accident rule had been introduced some 9 months prior to this time. It appears to me somewhat difficult to believe that the chief operating officer of the Company did not know of the two-accident rule change or even the existence of the prior one-accident rule without asking Tracey Williams. It is, however, wholly unreasonable to believe that Williams, in December 1980, would have told Traweek that Respondent's normal procedure was to discharge a driver after the first chargeable accident when he had himself memorialized an allegedly new, two-accident rule many months before this conversation. It is unnecessary to further belabor the point. I conclude that, on the basis of the disparity and contradiction in the testimony of Vice President Tracey Williams compared to the testimony of President James Traweek, as supported in contradiction by Cranford and Thompson, that, in fact, there was no discharge "rule" relating to accidents existing at the time of Cranford's discharge whether it be after a first accident or a second accident; that, in no event, could there be a single accident "rule" since James Reynolds had hit the same post or a similar post and was not discharged; and that the crude contradictions in the testimony of Williams and Traweek in any event, lead me to conclude that there was no such "rule" in existence in December 1980, whether it be a one-accident rule or a two-accident rule, which required the Cranford or any other discharge. I further conclude that in this regard that Respondent fabricated a defense to justify its discharge of Cranford. In raising a false defense, I conclude that Respondent has undermined its credibility with regard to its reasons for discharging Cranford.

Having found Williams to have committed unfair labor practices and expressed a willingness to discharge employees for their union activities, based on virtually uncontradicted testimony, I further conclude, on the basis of Cranford's activities as a card distributor, Respondent's false defense, and Traweek's and Williams' incredibility as witnesses, that Cranford, in fact, was told by Williams on December 15 that he was making "waves" that had to "stop," and that his "ship" was going to "sink"; that such a statement by Williams on December 15, on the same day following Respondent's receipt of the Union's request for recognition, constituted an unlawful impression of surveillance and a threat of discharge in violation of Section 8(a)(1) of the Act; and that on the evening of December 17, 1980, Williams, in fact, told Cranford that he was discharged both for the "trouble" that he had caused and because he had gotten into a second accident.

Williams' willingness to speak to employees about their union activities, contrary to his denial, is clear. I conclude that General Counsel proved a *prima facie* case of Cranford's unlawful discharge and, I further infer that Respondent's falsely interposed two-accident "rule" was an attempt to conceal its antiunion motivation. See, for example, *Wellington Hall Nursing Home, Inc.*, 257 NLRB 791 (1981). While the record, in my opinion, amply demonstrates the incredibility of Respondent's witnesses regarding the Cranford discharge, the difficult resolution was whether Cranford's testimony was credible: for it does not follow that Respondent's lack of credibility makes Cranford credible. Here, Respondent has pointed to instances of Cranford's testimonial failures—especially his poor recollection of dates. Taking all into account, however, and bolstering my original skepticism with Williams, and Traweeks' deficiencies, and especially the December 15 receipt of the union demand and the un-

denied Reynolds' testimony, I cannot say that Cranford should not be believed concerning his loading dock conversation with Willliams, 2 days before his discharge, or his telephone conversation with Williams.

The Board rule with regard to unlawful discharge of employees in situations where there may be at least two reasons for the discharge is announced in *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980). The Board rule is that where the General Counsel proves a *prima facie* case, as here, the burden of proof then shifts to the respondent to show that the employee was discharged wholly for reasons apart from the unlawful reasons which constitute the *prima facie* case. In the instant case, Respondent has advanced as its sole reason for the Cranford discharge his violation of a company rule requiring discharge of any truckdriver who has two chargeable accidents to his record. Although there is no question my mind (and General Counsel does not dispute) that Cranford was at fault in the two accidents of October and December 1980, and therefore has "two chargeable accidents" to his account, there was not only no proof of the existence of a rule by the Company to the above effect but the proof was to the opposite: that there was *no* such accident discharge *rule* in effect at the time of Cranford's discharge. Moreover, on the record, the existence of that rule came into play *only after* Cranford's discharge based on his credited and uncontradicted testimony. Respondent's failure to produce the allegedly widely distributed document or any employee to testify to its pre-December 17, 1980, existence, or to explain its failure to do so, leads to an inference of falsehood of dispositive weight. I therefore find that the *Wright Line* case is not a precedent to analyze the discharge here, since "false defense" cases, *Wellington Hall Nursing Home, Inc., supra*, do not even rise to the level of "pretext," *Limestone Apparel Corp.*, 255 NLRB 722 (1982), much less to the level of "dual motivation"; compare: *American Tool & Engineering Co., Inc.*, 257 NLRB 608 (1981), with *Babcock & Wilcox Co.*, 257 NLRB 801 (1981).

Rather, Respondent has interposed a false defense which itself supports the strength of the *prima facie* case and the conclusion, which I draw, that on or about December 17, 1980, in violation of Section 8(a)(3) and (1) of the Act, Respondent discharged Cranford because he engaged in union activities.

The discharge of Cecil Clinton Pace, Jr.

As above noted, I have concluded, partly on Respondent's failure to elicit testimony, in the form of a denial or explanation, from its employee, James Bounds, that he did *not* hear the conversation between Supervisor Mulch (who was not present at the hearing) and Pace wherein Mulch described Pace as "Jimmy Hoffa," that Mulch, *in fact*, did so on or about December 9, 1980, as Pace testified. I further found that such a statement creates the impression of unlawful surveillance of Pace's union activities in violation of Section 8(a)(1) of the Act. Even if Mulch's statement does not constitute a statutory violation, it nevertheless demonstrates Respondent's knowledge of Pace's union sympathy and support.

Pace testified[17] that he signed a union card and attended the December 6 union meeting. His sole other union activity was talking to the 40 to 50 other warehouse employees about the Union. Pace testified that he was a "vinyl puller" (he used a forklift truck in Respondent's warehouse cutting table where the order would be cut to size). The evidence quite convincingly shows that Pace was an indifferent and perhaps a lazy employee. This attitude, continuing over the entire 15-month period of his employment, from September 26, 1979, until the time of his discharge, on December 17, 1980, was manifested by his submission of work forms whereby he indicated that he was unable to locate materials from work order sheets presented to him but which materials were located, often in their proper places, by other employees and supervisors. His particular laxity apparently involved his repeated failure to get off the hi-low truck and to visually inspect the bins in which the rolls of floor covering were stored to see if the materials were actually present. It was not uncommon for large white identification tags, ordinarily attached to the ends of the rolls of rolled floor covering, to be missing. This would require the employee to get off the hi-low, approach and inspect the roll and see if the material, identifiable from a number written on the roll itself rather than appearing on the missing white identification tag, was actually present.

On an average day, Pace was regularly charged with finding 80 to 100 rolls pursuant to work orders. His normal submission of an inability to find particular rolls as with other employees, was two or three per day. In fact, the record of his (and other warehouse employees') inability to find rolls was recorded on each order sheet with the initial "NIL," i.e., "Not in Location," together with the warehouseman's initials. Again, Pace's particular problem was not that he submitted more NIL's then his coemployees (who also submitted two to three NIL's per day), but that Pace submitted NIL's in greater number where the material was ultimately locatable by his supervisor or coemployees. Thus, it is uncontradicted that the submission of NIL's was not the reason for Pace's discharge but rather the submission of a large number of NIL's which were subject to being found by his supervisor, Robert Mulch, or by his coemployees.

There was also no contradiction that Pace did not get along with Mulch and believed Mulch to be unduly harsh and demanding. There is no suggestion on this record that Mulch's antipathy to Pace, admittedly of longstanding, was created by the onset of union activity. On the contrary, it existed, on Pace's admission, com-

[17] Counsel for Respondent moved to strike all of Pace's testimony because of a violation of my witness sequestration order to which Pace was subject. In fact, an examination of Pace by Respondent's counsel showed that Pace's girlfriend, not a witness and then not included in the sequestration, had discussed a pamphlet, in evidence, with Pace contrary to my order to her not to discuss anything with any of the witnesses or parties in the matter. It appeared, however, that Pace did not know of my order to his girlfriend and Pace did not speak to the girlfriend with regard to any matter of testimony other than the pamphlet (which may have shown Pace at work). I reject counsel for Respondent's motion to strike Pace's testimony but I considered the violation of Pace's girlfriend, a nonwitness, in making any credibility resolution in this matter. In regard the violation as not significant and, in any case not prejudicial to Respondent. *RAI Research Corporation*, 257 NLRB 918 (1981).

mencing about a month after his first employment in September 1979.

Whether as a result of his laziness, bad luck, or Mulch's personal dislike, Mulch thereafter entered into Pace's work record no fewer than seven (according to General Counsel; nine, according to Respondent) warnings concerning his unacceptable work performance. Respondent asserts that two verbal warnings in addition to the written warnings should also be counted. In addition, Pace independently admitted to another written warning which does not appear in Respondent's records which would make it, respectively, either the eighth or tenth warning.

The record shows that these warnings which start, according to Pace, a month after being hired, in or about October 1979, all reflect Mulch's dissatisfaction with Pace's work efforts. One of the early, longer, and clearly menacing warnings (Resp. Exh. 5) dated March 6, 1980, adverts to prior warnings relating to checking goods and admonishes Pace, *inter alia*, to get off the forklift truck and discover information. In capital letters, Mulch notes that this was the "THIRD NOTICE." This document ends with the statement "if you show any further unacceptable work performance, your services will no longer be required."

Yet, a subsequent July 1, 1980, memorandum (Resp. Exh. 6) again charges Pace with a lack of productivity. In this regard, Pace testified that Mulch's demand that he do 140 to 150 orders per day is twice the normal production of vinyl pullers and was placed in his record because Pace was the only vinyl puller at the time. Two weeks later, a July 14, 1980, document recording further unacceptable work performance, again notes Mulch's conclusion that Pace was not doing acceptable work and that one of the reasons for it was his dislike from getting down off of the forklift truck to do his job. A still further warning of unacceptable work performance (Resp. Exh. 8) of August 22, 1980, notes a superabundance of NIL's which were found by Mulch when Pace could not find them and warns that another instance of turning in NIL's that are actually locatable would be "ground for termination." On December 10, 1980, 1 day after Mulch had called Pace "Jimmy Hoffa," as noted above, Mulch noted that Pace had turned in a further NIL which was locatable in the correct bin place and ends with the warning that if there was another NIL which was found in its correct location, it would result "in termination."

On Monday, December 15, Pace submitted an NIL which his acting supervisor, Ivor Steele (substituting for Mulch), actually found. When Steele had told him that he had found the roll, Pace asked him if Steele was going to fire him and Steele said "no," that he was not "like Mulch."

On Tuesday, December 16, Pace submitted no NIL's. On Wednesday, December 17,[18] however, he submitted an NIL. About 4:15 p.m., Mulch told him that he had found the material and then Mulch simply said, "Bye, Bye," while waving his hand. Pace said to him: "You must be kidding." Mulch answered: "No, bye-bye." Ten minutes later, Pace went to Vice President Williams' office to get his pay and vacation pay. He told Williams that Mulch had just fired him and that he wanted his pay. Williams asked him why he was fired and Pace told him it was because his NIL was found. Williams then called for Pace's pay and called Mulch to the office. Mulch handed him a document. The document apparently related to the reasons for the discharge but the General Counsel failed to submit the document which the General Counsel had in his possession into evidence. In any event, Williams told Pace that he had an attitude problem with Mulch and Pace told Williams that he got along with everybody except Mulch who, from the beginning, disliked Pace.

Tracey Williams testified that aside from the submission of NIL's which were found, he discharged Pace because of his bad attitude: that he was short, adamant, somewhat fresh with his supervisors, and his lack of speed. Thereafter, Williams testified that Pace's relative lack of speed was not a reason why he was discharged and that the reasons that he was discharged were because of his submission of NIL's which were found and because of his bad attitude. There was no evidence submitted to show that Pace was in anyway fresh, short, or adamant with his supervisors. Nor was any evidence submitted that his speed was poor. It is noted, however, that Williams submitted these as reasons for the discharge notwithstanding that "speed" was thereafter withdrawn and the bad "attitude," as developed in the testimony, related to Mulch's dislike of Pace rather than anything that Pace had done. Thus, at first blush, two of the three reasons originally advanced by Vice President Williams for the discharge of Pace were unsupported.

Williams testified that there were usually two or three vinyl pullers each of whom pulled about 110 orders per day. They each submit three NIL's on the average per day. Of the three NIL's, 80 percent are ultimately found and 60 percent are found in their correct bin places. The submission of NIL's result in no discipline except where the order is properly found and it is the employee's fault for not finding it. In that event, he is given a warning. Respondent submitted (Resp. Exh. 13) a list of warnings given to its carpet and vinyl pullers in the years 1979 and 1980. Of the nine vinyl and carpet pullers who worked in that period (some of them were current employees, some had resigned, and one had been terminated), five of the nine had received no disciplinary notices: Steve Martin had received three in the period April 1979 thru August 1981; Vincent Maysonet had received two disciplinary notices and Tom Trutt had received two in the period October 1977 thru June 1980. In the period September 26, 1979, thru December 17, 1980, Pace had received a minimum of seven or eight, according to his own testimony or ten according to Respondent's evidence. Williams testified that the only vinyl pullers who were disciplined in the period January 1979 thru December 1980 were Steve Martin and Alfred Gangloff. While Martin appears on the record, Gangloff does not.

In particular, Williams testified that three disciplinary notices in a personnel record were grounds for dismissal—not necessarily actual dismissal, but grounds for dis-

[18] Traweek, *supra*, testified that the Union's petition for certification may have been received on December 17.

missal. This policy existed since 1975 and employees were notified of this company policy in a memorandum which was brought to their attention only by their supervisor at the time that discipline was accorded. In this regard, as above noted, as early as March 6, 1980, Mulch warned Pace (Resp. Exh. 5) that he was giving him his third notice and that another unacceptable work performance warning would result in his termination. This same admonition occurred on August 22 and December 10. The last one occurred 1-day after Mulch had identified Pace as "Jimmy Hoffa."

Discussions and conclusions with regard to the discharge of Pace

The record shows that in 15 months of employment, Pace had been given more than a half-dozen warnings of unacceptable work performance and several warnings that continued lack of acceptable work performance, and particularly his submission of NIL's, subsequently found, would result, or at least could result, in his termination. In particular, the third such notice, in accordance with Respondent's rule of grounds for termination, occurred as early as March 6, 1980 (Resp. Exh. 5). Thereafter, there were three additional similar warnings and admonitions, and a fourth one the day after he was identified as a Teamsters adherent. Aside from an early warning notice of January 30, 1980, a copy of which was also sent to an apparent supervisor by the name of Harold Reiland, the other disciplinary warning notices, on this record, were merely shown to have the following copies distributed: a copy to the employee, a copy to the personnel department and a copy to the file. The December 10 notice (Resp. Exh. 9), however, shows that a copy went to T. J. Williams. This, I assume, is Tracey Williams, Respondent's vice president. This last warning notice, although it relates to prior discovered NIL's, contains no threat of discharge.

There is no objective evidence that Pace was a prominent union ringleader or activist or that Respondent bore him any identifiable union animus. On the other hand, Mulch's "Jimmy Hoffa" remark demonstrates that Mulch characterized Pace as a known union supporter, whether objectively merited or not. The question presented here is the motivation for the discharge in light of the fact that Pace was not a good employee and was the subject, more than another vinyl or carpet puller, of warnings and admonitions concerning his unsatisfactory work.

It is clear that an employer, in the face of a union organizational campaign, is not required to maintain in its employment an employee who engages in union activities but who nevertheless would, under normal company rules, be discharged. Thus, union activity is not, and has never been a shield, for lawful discipline. However, bad employees and good employees are protected in their union activities under Section 7 of the National Labor Relations Act and Respondent is precluded from disciplining an employee ostensibly for his work performance, if the actual motive related to his union activities.

In the instant case, Respondent had been, on this record, threatening for more than a year to discharge Pace because of his poor work performance. Certainly no later than March 6, 1980, 9 months before the discharge, Respondent served upon him a crucial *third* notice of unacceptable work performance and threatened him with the possibility of discharge if it continued. This is clearly consistent with the Williams' testimony of a policy whereby three warning notices were grounds for termination (without necessarily requiring termination). After this third warning notice of March 6, 1980, Respondent served upon Pace at least three other warning notices concerning his unacceptable work performance, including an August 22, 1980, threat of termination if his work performance, especially his submission of groundless NIL's, continued (Resp. Exh. 8). Yet, Respondent took no action based on such a severe warning. On or about December 8, 2 days after the December 6 union meeting, Pace submitted a further groundless NIL which resulted in a notation merely that it was groundless (Resp. Exh. 9) but that notice, unlike other notices, was sent to Vice President Williams; and on the next groundless NIL, he was summarily discharged by Mulch.

The question presented is: how long must Respondent accept unacceptable work performance from an employee in the face of a union campaign of organization. The answer, of course, as above noted, is that an employee is not shielded from normal employer discipline because he is engaged in union activities. Here, however, Pace was engaged in his normal, i.e., poor, work performance after many employer warnings and threats of discharge before the start of the union organization campaign. On December 9, his is identified as a union activist and on December 17, for similar poor work performance, he is discharged. Thus, the only apparent difference between his receiving continuous warnings and threats of discharge relating to the same malfunction, and the actual discharge, on this record, is Mulch's identification of him as a union adherent. The question arises whether this "Jimmy Hoffa" identification was causal or merely a concommitant of the immediately ensuing discharge.

On the one hand, Respondent is under no obligation to maintain in its employ an unacceptable employee; on the other, the question is what, indeed, awakened Respondent to take action against Pace for his poor work performance; what caused Respondent to execute that threat upon Pace's repetition of merely another example of that poor work performance. In other words, was he discharged for doing nothing more than to miss finding another roll of vinyl and submitting another groundless NIL. And what weight, if any, is to be placed on Supervisor Mulch's evident glee in discharging Pace for this further mundane act of unacceptable work performance. While the matter is hardly free from doubt, yet in view of the December 8 "Jimmy Hoffa" identification of Pace by Mulch and the suspicious forwarding of the last warning slip (Resp. Exh. 9) containing no threat or warning of discipline, to Vice President Williams, and Mulch's glee in notifying Pace of the discharge leads me to conclude that the reason Pace's poor work performance became the subject of his discharge was his identification as a union member. An otherwise justifiable business reason cannot be used as a pretext for discriminatory firing. *N.L.R.B.* v. *Central Power & Light Co.*, 425

F.2d 1318, 1322 (5th Cir. 1970).[19] In reaching this conclusion I realize that, at best, Vice President Williams told Reynolds that he was not going to discharge the "fence-sitters" but rather those who were leading the union organization. Here, while there is no suggestion that Pace was heading up any union drive, as was the case with Cranford, he was identified by his supervisor as a union activist. Whether this was merited or not, it existed in Mulch's eyes and was, it seems to me, a significantly distinguishing characteristic. Similarly, the absence (even with Mulch not present as a witness) of any testimony supporting Respondent's assertion that Pace was a slow worker or fresh to his supervisor is a troublesome factor in crediting Respondent. I therefore conclude that, as alleged, Clinton Cecil Pace was discharged by Respondent on December 17, 1980, in violation of Section 8(a)(3) and (1) of the Act. In this regard, I note General Counsel proved a *prima facie* case and Respondent failed to carry its burden that it would have discharged Pace wholly for reasons unconnected with Pace's union membership. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980); cf. *Paramount Metal & Finishing Co., Inc. and Paramount Plating Co., Inc.*, 225 NLRB 464, 465 (1976).

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union #385, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, on December 6, 1980, violated Section 8(a)(1) of the Act by coercively interrogating and surveilling the union activities of its employees; on December 9 by giving the impression that their union activities were under its surveillance; on December 17, 1980, violated Section 8(a)(3) and (1) of the Act by discriminatorily and unlawfully discharging employees Pace and Cranford because of their activities on behalf of and membership in Local 385, International Brotherhood of Teamsters; and on December 15 and 23, 1980, by unlawfully threatening to discharge employees for union activities.

4. The unfair labor practices herein affect commerce within the meaning of the Act.

Remedy

Having found that the Respondent engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It has been found that Respondent, in violation of Section 8(a)(1) and (3) of the Act, unlawfully terminated employees Clinton Pace, Jr., and Charles K. Cranford. It will therefore be recommended that Respondent offer to said employees immediate and full reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings suffered by reason of the unlawful discrimination against them by payment to them of backpay equal to that which they, individually, would have earned from Respondent from the date of their unlawful terminations to the date of Respondent's offer of unconditional reinstatement, less any net earnings during such period, with the backpay and interest thereon computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[20] Respondent will further be ordered to preserve and make available to the Board, upon request, all payroll records and reports, and other records necessary and useful to determine the amount of backpay due to the alleged discriminatees and their rights to reinstatement under the terms of these recommendations. Respondent will also be directed to past the attached notice.

[Recommended Order omitted from publication.]

[19] Open hostility to the union and discharge of an employee shortly after the employer learns of his union activity, as here, may give rise to an inference that the discharge was discriminatory. *N.L.R.B.* v. *Central Power & Light Co., supra* at 1322, citing *N.L.R.B.* v. *Camco, Incorporated*, 369 F.2d 125, 127 (5th Cir. 1966).

[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).